SUPREME COURT, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-690

CHARLES W. ANDERSON and ANITA ANDERSON,
*Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITIONERS' REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The basic point made in the Petition for a Writ of Certiorari was that the Court of Appeals for the Eighth Circuit reversed petitioners' convictions on nine of eleven counts, having found that petitioners were deprived of their rights under the sixth amendment to confront the witnesses against them, but that their convictions on two counts were affirmed through

the application by the court of appeals of the erroneous "harmless error" standard, a wholly inappropriate standard in a case where convictions have been obtained by constitutional error. In such a case the appropriate standard of review requires a determination of whether the constitutional error, which in this case was easily found and clearly acknowledged by the court of appeals,[1] might have contributed to the convictions. The error of the court of appeals, which this Court should review and reverse, was its failure to apply the standard required by this Court's decisions in *Chapman* v. *California*, 386 U.S. 18 (1967), and *Fahy* v. *Connecticut*, 375 U.S. 85 (1963). The *Fahy-Chapman* standard clearly forbids the application of the "harmless error" standard in any case where there has been constitutional error such as that here; yet the forbidden standard was the one employed by the court below.

In the Government's Memorandum in Opposition, the Solicitor General concedes (page 1) that the prosecution of petitioners was based on the theory that they engaged in a *single* scheme to defraud, even though petitioners were charged in a twelve-count indictment. It is crucial to an understanding of this case to remember that only one scheme was charged, and the scheme was incorporated into each of the individual counts. The only difference between each count was that a different mailing was alleged in each. With this factor in mind, an examination of the decision by the court

[1] The Solicitor General's Memorandum in Opposition "does not concede" that the error was of constitutional proportions (page 3, footnote 1), yet no argument or citation to authority is put forward by the Solicitor in disagreement with this determination by the lower court.

of appeals shows that the lower court's reversal of petitioners' convictions on nine counts was based upon a finding that the Government had insufficient evidence to prove an essential element of the scheme—that element being the actual value of real estate allegedly involved in the scheme. As set forth in great detail in our petition, there is no logical consistency whatsoever in the court of appeals' decision which, having found the absence of a scheme as to nine counts, nevertheless found the establishment of a scheme as to two counts which were affirmed. Accordingly, the petition urged this Court to reverse petitioners' convictions on the simple constitutional ground that if the jury was or might have been influenced in finding a scheme as to nine counts by unconstitutionally admitted evidence, their finding as to a scheme on Counts II and III had to be based on the same evidence and the convictions on those two counts must also be reversed.[2]

The Government's Memorandum attempts to meet the basic point raised in the petition, that the court of appeals failed to recognize or apply the special constitutional standard required by *Fahy* and *Chapman*, with two curious statements: first, that this Court should not assume that the court below failed to apply the proper standard merely because the *Chapman* case was not cited nor discussed; and second, that even in

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[2] For some unexplained reason, the court of appeals found that one of the six properties involved was peculiarly or specifically involved in Counts II and III, and that since some untainted evidence of value existed as to that property alone, the convictions on those two counts could be affirmed. This analysis completely missed the point. It was the Government's failure to prove a *scheme* which required a reversal. The scheme was the same in Counts II and III as it was in the other nine counts as to which the lower court found that no scheme had been shown except through constitutional error.

applying the *Chapman* standard, there was strong independent evidence to support the convictions. In this regard the Government's Memorandum states (pages 3-4):

> There is, however, no reason to assume that the court of appeals, which found the error to be of constitutional magnitude [footnote omitted], failed to apply the *Chapman* standard in finding such error to be harmless. Applying the *Chapman* test, the court's holding of *harmless error* as to the parcel involved in the two affirmed counts was justified *in light of the strength of the independent evidence of the value of the property.* (Emphasis added).

The Government's first argument, that we should not assume a failure by the lower court to apply the proper standard, is a fallacious argument. Even a cursory examination of the lower court's opinion shows that the court did not even purport to apply the proper standard, and in fact the lower court did not even indicate that it understood the crucial difference between the *Fahy-Chapman* standard and the "harmless error" standard which it applied. The court of appeals' analysis focused exclusively on the questionable strength of "other evidence" (clear indication that the "harmless error" test was being applied), and the court of appeals failed to question or analyze whether the constitutional error *might have contributed* to the convictions on Counts II and III which it affirmed, an analysis required by *Fahy-Chapman,* and an approach which is wholly different from a "harmless error" examination.

The most significant aspect of the Government's position as stated in its Opposition, is that while apparently conceding the applicability of the *Fahy-Chapman* standard, the Solicitor nevertheless lapsed into an application of the "harmless error" concept (using the words "harmless error"), and the Solicitor's examination focused exclusively on "the strength of the independent evidence of the value of the property," the same focus as the court of appeals', and a focus which ignores the crucial question of whether the constitutional error might have contributed to the petitioners' convictions on Counts II and III. And even in its reiteration of the "harmless error" standard, the Government's Memorandum indicates that the only independent evidence which can be found or relied upon to warrant an affirmance under this incorrect standard is the letter written by Mr. Anderson wherein he states a value for one of the properties to be $12,000.

As we stated in our petition, this letter does not constitute any evidence whatsoever as to the value of this particular property because the value was stated for a "vacant lot" when, in fact, the parcel was improved; at trial the Government disregarded this valuation, contending that the property had a value of $29,000 to $30,000; and the Government did not rely on this letter to show the value of this parcel, *relying instead upon the unconstitutionally admitted testimony by the county real estate appraiser.* Accordingly, even when the improper "harmless error" standard is applied, it is clear that apart from the assessor's testimony the Government had no competent or reliable evidence to prove the value of any parcel of property, and therefore, had no evidence whatsoever to support an essential element

of the scheme alleged and incorporated into each count. Finally, the Government's reference to the bankruptcy schedule showing the amount of incumbrances on one of the properties has absolutely nothing to do with the question of value. The question of the amount of incumbrances was a separate element of the alleged scheme and it does not have to be reached. Unless the value element is supported by evidence, the scheme is not made out.

Nowhere in its Memorandum does the Government deny that the trial outcome was greatly affected by the unconstitutional admission of the assessor's testimony. In light of *Fahy* and *Chapman,* this fact alone should be the end of the matter. Petitioner's convictions should have been reversed on all counts. As indicated by Stern & Gressman, *Supreme Court Practice* (Fourth Edition), citing *SEC* v. *Otis,* 338 U.S. 843 (1949), and *FCC* v. *Broadcasting Service Organization, Inc.,* 337 U.S. 901 (1949), the failure by a federal court of appeals to acknowledge or apply controlling precedent of this Court has always been a most compelling reason for a grant of certiorari, and frequently with a *per curiam* reversal:

> "A direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is, of course, one of the strongest possible grounds for securing the issuance of a writ of certiorari. . . . Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari." Stern & Gressman, *supra,* Section 4.5, pp. 158-159.

## CONCLUSION

For the reasons stated herein and in the petition, a writ of certiorari should be granted; petitioners' convictions on Counts II and II should be reversed; and a judgment of acquittal should be entered.

Respectfully submitted,

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